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Note & Comment

***787** HARMONIZING INTERESTS ON THE INTERNET: ONLINE USERS AND THE MUSIC INDUSTRY

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> "We must protect the rights of the creator, but we cannot, in the name of copyright, unduly burden consumers and the promising technology the Internet presents to all of us." [FN1]

INTRODUCTION

The divergent interests between online users [FN2] and the music industry [FN3] have created disharmony on the Internet. [FN4] When the music industry began trying to secure control over the reproduction, distribution, and sale of their copyrighted musical works on the Internet, it began causing problems for online users who shared files using new ***788** technologies such as MP3 compressed file formats, [FN5] online services such as Napster, [FN6] and the peer to peer (p2p) software programs like Grokster. [FN7] The music industry wants to identify online users who have illegally shared music files on the Internet to sue them for copyright infringement. Online users should be free to use new technological advancements on the Internet without fear of whether their identity will be disclosed by their Internet Service Provider (ISP). As such, users want to maintain their anonymity and privacy until a court determines that there is a reasonable probability that they have illegally shared music files. The desires of online users and the music industry can coexist, but it requires both parties to cooperate. [FN8]

Technological advancements concerning playing and distributing music on the Internet have their advantages and disadvantages. The advancement to MP3 compression file format benefits online users and copyright owners in the music industry because it significantly decreases the file transfer time and the amount of hard drive storage space required for music files. [FN9] Members of the music industry, especially new musicians, can gain public exposure for their music by uploading new music to the Internet for preview or for purchase. [FN10] Users are then able to preview a new song, which may influence their ***789** music purchases. [FN11] Users are also able to purchase and download music from the Internet and create music compilations. [FN12] Music on the Internet has great potential for online users but neither party can utilize those advantages without the other's involvement.

Online users and the music industry have felt the impact of illegal music file sharing. One

disadvantage of music on the Internet is that an online user can anonymously upload music files to the Internet without the copyright owner's consent. [FN13] Once an online user uploads a music file to the Internet that file can be downloaded by thousands of other anonymous online users for free, and this is having a negative effect on the music industry's revenue. [FN14] Illegal music file sharing may deter musicians from using the Internet to distribute their music, and loss profits from sales of sound recordings could discourage musicians from writing or performing new music. [FN15] The disadvantages for the music industry force it to struggle to find new methods to deter so-called "digital piracy." The actions taken by the music industry thus far, however, is seen as overreaching by online users, who are fighting back to protect their interests.

This Comment focuses on how the interests of the music industry and online users can be balanced. Part I discusses the background of the conflict between online users and the music industry. Part II begins by first explaining why the music industry seeks to discover the identities of online users. It continues by exploring why online users want to prevent the music industry from discovering their identity. Part III concludes with a proposed solution that balances the competing interests in a way that does not give either side everything it wants, but will balance their interests to achieve what they need.

I. WHAT'S GOING ON [FN16] . . . BACKGROUND DISCUSSION

A. The Copyright Act

The music industry is entitled to control its musical works based on the Copyright Act. [FN17] Congress granted copyright owners, including ***790** the music industry, their rights through the power of Article I of the Constitution, which states in part that "Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [FN18] To implement this clause of Article I, Congress enacted the Copyright Act. [FN19] The Copyright Act establishes a "bundle of rights" [FN20] that grants copyright owners the exclusive right to control how their works are performed, displayed, copied, distributed, recorded, and adapted. [FN21]

The Copyright Act also entitles the copyright owner to bring a legal action against any person, [FN22] who infringes on these rights. [FN23] A misunderstanding of the Copyright Act is that its purpose is to reward copyright owners for their hard work; actually, its purpose is to benefit the public by encouraging creativity among artists and scientists. [FN24] The presumption is that if given a marketable right to control their creative works, copyright owners will be encouraged to create and share their works, thereby benefiting the public. [FN25] The music industry's marketable right to control its musical works has made it very profitable to continue its business. [FN26]

B. Overview of Section 512 of the DMCA

Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA) [FN27] to balance the goals of the Copyright Act and the technological***791** advancements on the Internet. [FN28] Section 512 of the DMCA (Section 512) was created to balance the interests of copyright owners, like the music industry, and ISPs. Through a notification and a subpoena process, Section 512 accomplishes Congress' goal of limiting the liability of online service providers for copyright infringement and giving copyright owners the power to police their works on the Internet.

1. The Notification Process

The notification process of Section 512 gives copyright owners the power to have infringing material removed from ISP websites without judicial intervention. [FN29] The notification process encourages ISPs--who cached, stored, or linked users to alleged infringing material--to immediately remove that material from their network or system upon receipt of notice. [FN30] Section 512 limits the liability of ISPs because it does not require an ISP to police its network for infringing material. [FN31] Instead, it encourages copyright owners to police the Internet for their copyrighted works. [FN32] Once a copyright owner discovers infringing material on the Internet, she can choose to notify the ISP; [FN33] however, Section 512 requires her to notify the ISP before instituting any legal action against the ISP for copyright infringement. [FN34] The notification process is effective for copyright owners because it gives them the opportunity to have infringing material removed immediately without having to incur legal costs.

***792** While Section 512 gives copyright owners with the power to police their works on the Internet through a notification process, Congress provided safeguards for ISPs. These safeguards guarantee that ISPs are dealing with a copyright owner who has a legitimate complaint. One safeguard provides that the notification must be accompanied by a "statement that the complaining party has a good faith belief that use of the [allegedly infringing] material is not authorized by the copyright owner, its agent, or the law." [FN35] Another safeguard requires that the notification is accompanied by a "statement that the information in the notification is accurate, and under penalty of perjury" that the copyright owner or agent has the authority to act. [FN36] With these safeguards, ISPs have some assurance that the complaints are valid and they shift liability for wrongly removed material from the ISP to the copyright owner. [FN37] Nevertheless, the power of the notification process is important for copyright owners to thwart the continued pirating of their creative works.

2. The Subpoena Process

If a copyright owner chooses to sue an alleged copyright infringer, she may have to come into compliance with Section 512(h). Section 512(h) grants copyright owners the power to subpoena an ISP to disclose the identity of an alleged infringer. [FN38] The purpose of the subpoena process is to allow the copyright owner to sue the direct infringer, who will likely be an ISP customer. The copyright holder can use the name and address of the alleged infringer to serve the subpoena for a lawsuit, or an injunction to refrain from uploading infringing material. [FN39]

Under Section 512, the copyright owner subpoenas the ISP, ordering it to disclose the identity of alleged infringers who are its customers. [FN40] Either the copyright owner or a representative may serve the subpoena. [FN41] Any U.S. District Court clerk may "expeditiously issue and sign" the subpoena, so long as the copyright owner has filed a ***793** notification identifying the infringing material, a proposed subpoena, and a sworn declaration that the purpose of the subpoena is to identify an alleged infringer and will be used for protecting a copyright owner's rights. [FN42] "The issuing of the order [is] . . . a ministerial function performed quickly," [FN43] preventing a copyright owner from enduring lengthy judicial processes in order to receive a subpoena from the federal court clerk. The subpoena orders the ISP to "expeditiously disclose" the identity of the alleged infringer based on the information described in the notification provided by the copyright owner. [FN44]

Section 512 grants copyright owners the power to have ISPs remove infringing material and to have ISPs disclose the identity of alleged copyright infringers; if the ISP does not comply, it maybe held liable for copyright infringement. [FN45]

C. Napster Revolutionizes Music File Sharing

The Copyright Act and the DMCA protect the rights of the music industry. Congress, however, has consistently maintained that copyright owner's use of either Act should not hinder technological development. [FN46] Instead, protecting creative works should encourage others to create and invent new works. [FN47]

In 1999, Shawn Fanning, creator of Napster, [FN48] restructured music distribution by allowing online users to share music files on the Internet. In its initial form, Napster allowed online users to create a library directory of record singles and search other users' library directories for record singles that they wanted. [FN49] Napster's service design was a central server-based model, where Napster's online users uploaded their list of song names to Napster servers and other online ***794** users searched those song lists for music files to download. [FN50] Online users did not download music files directly from Napster's site or servers; instead they downloaded music files from other online users' personal computers. [FN51] Napster provided a searchable index that allowed online users to easily share music files. [FN52]

In response to Napster's online service, various music labels sued Napster for contributory [FN53] and vicarious [FN54] copyright infringement. [FN55] In A&M Records v. Napster, the music industry argued that they were losing millions in revenue due to Napster's infringement because Napster users downloaded copyrighted music for free instead of purchasing it in stores. [FN56] The U.S. Court of Appeals for the Ninth Circuit agreed that Napster was liable for contributory and vicarious infringement. [FN57] The Ninth Circuit concluded that Napster's service caused album sales among college students to decrease and "rais[ed] barriers" [FN58] for the music industry's entry into the Internet market. [FN59] The Ninth Circuit enjoined Napster from operating until they came into compliance with the court's guidelines to prevent continued copyright infringement. [FN60] Napster was a technological advancement to music distribution on the Internet; however, its use by online users and its ***795** knowledge of that use made it liable for contributory and vicarious copyright infringement.

D. P2P Software Programs Restructure Music File Sharing

In 2001, as Napster, in its initial form, and similar services were shut down, p2p [FN61] client software programs like Kazaa, Gnutella, and Grokster began offering anonymous online users the means to share music files without the Napster design. P2p software programs like Grokster did not require a central server; they only required the installation of their software; users then connect to the same network, which makes music file transmissions seamless. [FN62] The primary difference between Napster and Grokster is the search feature. [FN63] Napster users searched Napster's servers for a list of songs to download and then would connect to the individual user's personal computer to download the music file. [FN64] The song list for Grokster users is installed on their personal computers. [FN65] Grokster users perform a search by connecting to a p2p network and searching other p2p network users' personal computers for music file names based on the user's search criteria. [FN66] Next, Grokster's software program creates a music file name list on the user's personal computer so that she can select which music files to download. [FN67] Once the user has selected a music file, she connects directly to the other user's personal computer to download the music file. [FN68]

Grokster's and similar p2p software programs' designs are similar to Napster because they both provide structured music file sharing capabilities; but unlike Napster's online users, p2p users do not connect to any central server to access music file indexes. P2p software programs are more appealing to online users because they allow direct communication among online users.

***796** As in A&M Records v. Napster, the music industry sued Grokster and other p2p software companies for contributory and vicarious copyright infringement. [FN69] In MGM Studios, Inc. v. Grokster, Ltd., however, the U.S. Court of Appeals for the Ninth Circuit found that these decentralized software programs, with substantial legitimate reasons and purposes, [FN70] could not be held secondarily liable for copyright infringement. [FN71] The Ninth Circuit reasoned that how users utilized these programs were out of the software owners' control. [FN72] P2p software programs were not created for the specific purpose of illegally downloading music files, they were created for user-to-user communication. [FN73] The technological advancement from Napster-like services to p2p software programs has made it difficult for the musical industry to control its copyrighted musical works. Online users, however, have benefited because p2p technology has given users a new method of communicating and sharing information on the Internet.

E. Music Industry Subpoenas ISPs for Online Users' Identities

1. Subpoenas Issued Under Section 512's Subpoena Power

In 2003, after the court concluded that p2p software companies and networks were not liable for contributory or vicarious copyright infringement, the Recording Industry Association of America (RIAA), [FN74] on behalf of the music industry, began filing lawsuits ***797** against individuals for copyright infringement. [FN75] The RIAA's process for filing an action against online users accused of copyright infringement has about six investigative steps. [FN76] One of those steps includes subpoenaing the ISP for the name and address of the ac-

cused online user. [FN77]

Verizon Wireless Services (Verizon) and other ISPs contested the constitutionality of the subpoenas and were consequently sued by RIAA to enforce the subpoenas based on Section 512. [FN78] In the two cases of RIAA v. Verizon (Verizon II cases), the U.S. District Court for the District of Columbia ruled in favor of RIAA. [FN79] Verizon appealed, and both cases were consolidated and heard before the U.S. ***798** Court of Appeals for the District of Columbia, which reversed and held in favor of Verizon (Verizon III). [FN80]

Verizon argued that Section 512's subpoena power did not apply to ISPs acting as a conduit for infringing material. [FN81] In the Verizon II case, the district court stated that Section 512's subpoena process applied to all ISPs, including those who only act as a conduit for infringing material. [FN82] The district court noted that Congress structured Section 512's subpoena process "to assist copyright owners in protecting their copyrights." [FN83] The district court also reasoned that

> [c]opyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a payer piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. [FN84]

The district court's analysis led it to determine that the Section 512 subpoena power applied to all ISPs; therefore, Verizon had to comply with the subpoenas. [FN85]

In Verizon III, the appellate court recognized that the purpose of Section 512 was to help copyright owners prevent digital piracy, but it disagreed with the district court's reasoning that the structure of Section 512 applies to all ISPs. The appellate court found that Section 512 was created so that copyright owners could contact an ISP to have them remove infringing material from their networks. [FN86] Because online users were sharing files using p2p networks, which does not give the ISP the ability to remove or access the infringing material, the appellate court reasoned that Section 512 can not apply to all ISPs. [FN87] In stark contrast to the district court's reasoning, the appellate court found that "Congress had no reason to foresee the application of § 512[s] . . . [subpoena power] to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along." [FN88] The Verizon III court restricted copyright owners' ability to ***799** serve subpoenas to ISPs if the infringing material is not stored on the ISP network.

Another Verizon argument was that Section 512's subpoena powers violated online users' First Amendment right to anonymously speak and associate on the Internet. The district court had maintained that the Copyright Act addresses First Amendment concerns and therefore copyright infringers do not require protection under the First Amendment. [FN89] The district court noted that the Fair Use Doctrine [FN90] of the Copyright Act addresses these First Amendment concerns because it limits the exclusive rights of copyright owners and prevents the violation of the public's rights. [FN91] The district court's analysis led it to conclude that the Copyright Act provided sufficient First Amendment protection for copyright infringers. [FN92]

The district court also noted that the U.S. Supreme Court has stated that there is no general right to anonymity; instead, this right is limited in areas concerning freedom of speech, [FN93] freedom of religion, [FN94] freedom of association, [FN95] and freedom of the press. [FN96] Furthermore, the district court reasoned that the right to anonymity on the Internet has been restricted by the Supreme Court to First Amendment cases, ***800** which does not include copyright infringement. [FN97] The district court, however, did briefly note that the Court has concluded that there should be First Amendment protection for anonymous expression on the Internet, "even though the degree of protection is minimal where alleged copyright infringement is the expression at issue." [FN98] In its analysis, the district court reasoned that Section 512 "does not directly impact core political speech," thus does not require the same level of protection as First Amendment clauses such as freedom of speech and freedom of expression. [FN99] The district court held that there was no First Amendment protection for online anonymity in these cases.

Since the appellate court held that the structure of Section 512's subpoena powers did not apply to ISPs acting as a conduit for infringing material, the court did not rule on Verizon's First Amendment constitutional issue. [FN100] RIAA's writ of certiorari to the U.S. Supreme Court has been denied, so it is unpredictable what the majority of federal district courts will hold when confronted with the issue of online anonymity protection in copyright infringement cases. [FN101]

2. Subpoenas Issued in John Doe Actions

In the Verizon II cases, Verizon argued that John Doe actions could be an alternative for copyright owners instead of Section 512 subpoena power for p2p music file sharers. [FN102] Verizon's alternative process required the copyright owner to get a third-party subpoena that would be issued to the ISP; the ISP would then forward it to the online user. [FN103] The district court dismissed Verizon's suggestion on the grounds that nothing in the DMCA history "indicate[s] that Congress contemplated . . . utilizing John Doe actions." [FN104] The court found that compared to the Section 512 subpoena process, John Doe actions would be more burdensome on federal courts and would be ***801** too expensive and time consuming. [FN105] The district court also determined that the subpoena power of John Doe actions have less protection than the subpoena power of Section 512 because there are more requirements for obtaining a subpoena under Section 512 than in a John Doe action. [FN106] Ironically, although the court in Verizon III did not rule on the constitutionality [FN107] of the right to online anonymity, the ruling forced the music industry to file John Doe actions for monetary or injunctive relief. [FN108]

From MP3 file format to Napster-like online services to p2p software programs, the technological advancement of music on the Internet has been both beneficial and damaging. The music industry is spending time lobbying Congress for legislative protection of its Internet interests; additionally, they are spending money suing online services and software companies for contributory and vicarious copyright infringement. On the other hand, online users want the freedom to use technologies such as p2p software programs without worrying that their identity may be disclosed to the music industry. The music industry's and online users' interests are at odds, and the present process of filing subpoenas will lead to only one party win-

ning.

II. WHY I SING THE BLUES [FN109] . . . THE DESIRES OF EACH PARTY

In a dispute, the goal is not for each party to acquire what they want because usually that results in only one party winning. [FN110] The object is to understand why each party has taken their positions. [FN111] Once each party understands why their opponent has taken a position, and is willing to respect that reasoning, then they can agree as to what they need. [FN112] Online users and the music industry's understanding of ***802** what each party needs should allow them to work together to create a solution where both parties are winners. [FN113]

A. Profit Loss

The reason why the music industry wants to obtain online users' identities is to file lawsuits or negotiate settlement agreements, which they believe will deter digital piracy and cut profit loss. [FN114] If sharing music files did not negatively affect its profit margin, arguably the music industry would not care about protecting its exclusive right to distribute or reproduce its works. The music industry alleges that it is using these subpoenas to deter online users from sharing music files because it claims that it is losing profits.

The purpose of the Copyright Act is not to reward copyright owners but to encourage them to create for the public good. [FN115] Courts and Congress are protecting the music industry's interest in profiting from its works. [FN116] There is the fear that if artists are not paid for their works, then they will not be willing to share their artistic creations with the public. [FN117] As long as the music industry can profit from its musical creations, it will take the necessary steps to protect its interests. The music industry will continue to subpoena ISPs for the disclosure of online users' identities until it believes that digital piracy will no longer substantially impact its income.

B. Invasion of Privacy

Online users want to prohibit the music industry from obtaining their identities. Currently, online users are having their identity disclosed without their knowledge, without a legal determination that they have committed an illegal act, and without the opportunity to defend their anonymity. Anonymity protects an online user's privacy by hiding her real identity. [FN118]

***803** Online anonymity encourages users to participate freely in chat rooms, use p2p networks for file sharing, or upload and download information on the Internet. Privacy on the Internet is an interest that online users want to protect and the disclosure of one's identity jeopardizes this interest. Online users want to prohibit the music industry from obtaining their identities because they want to protect their privacy on the Internet.

1. Congressional Protection Is Insufficient

Online users' privacy interests are not well protected by legislation. Even though Congress may have passed laws prohibiting data collection, the laws normally require the online user to notify the ISP or website owners that they do not want their private data collected. [FN119] Unfortunately, some online users assume the opposite, that their information is automatically protected and that they have to give consent to have their information disseminated and sold. [FN120] Also, website operators and ISPs are only encouraged by the Federal Trade Commissioner to display their privacy policy on data collection; they are not mandated. [FN121] Data collection of online users' private information without their consent continues; [FN122] and online users must do their best to secure their own online privacy. [FN123]

2. Judicial Protection Is Limited

The court has limited its protection of online users' anonymity in copyright infringement cases. In the Verizon II cases, the district court ***804** explains that Section 512 concentrates on copyright infringement and does not violate the First Amendment right to online anonymity. [FN124] The court incorrectly reasoned that the Fair Use Doctrine [FN125] of the Copyright Act addresses these First Amendment concerns because it limits the exclusive rights of copyright owners and prevents the violation of the public's rights. [FN126] In these cases, the court fails to recognize that p2p technology allows users to share more than copyrighted works.

Online users can share files that have information about AIDS, cancer, abortion, or any information that online users may not want to share with their family or friends. The Fair Use Doctrine does not address protecting this type of information; it discusses copyrighted works. Courts must recognize that the loss of anonymity may have a greater impact to online users than to just their ability to upload or download copyrighted materials anonymously.

3. John Doe Actions

John Doe actions do not provide adequate protection for online users' privacy. In fact, Section 512(h) subpoena power provides more protection than the subpoena power in a John Doe action. [FN127] A subpoena under a John Doe action is based on Rule 45 of the Federal Rules of Civil Procedure, which requires the subpoena to state the name of the issuing court, the "title of the action, the name of the court in which it is pending, . . . its civil action number" [FN128] and its request. [FN129] Section 512(h) requires that copyright owners follow Rule 45. [FN130] It also demands that copyright owners have a good faith belief that there is infringing material, provide a statement that the information is accurate, give sufficient information to identify the infringing material and the subpoena, present a sworn declaration under perjury ***805** that the subpoena is for the purposes of protecting the copyright owner's rights, must be signed by the copyright owner or her agent. [FN131]

Section 512(h) may have more requirements than a subpoena required for a John Doe action, but it is still insufficient to protect online users' privacy. Neither Section 512(h) nor John Doe actions require that the user has prior notification or has the opportunity to file a motion to quash the subpoena before disclosure. [FN132] Anonymity provides greater protection for online users' privacy than what is currently offered by the courts or Congress. The interest in

maintaining their privacy is why online users want to prohibit the music industry from obtaining their identity.

Online users need to protect their privacy and the music industry needs to reduce profit loss. The music industry should not have the identity of online users who have not infringed. The current subpoena process does not give online users, prior to disclosure of their identity, the opportunity to challenge and show that they are not copyright infringers. As a result, only one party is allowed to win.

III. WHEN CAN I SEE YOU [FN133] . . . A PROPOSED SOLUTION

In developing a cooperative relationship it may become necessary for a third party to interject and set guidelines encouraging the relationship. Encouraging opponents to cooperate and resolve their disputes without judicial intervention reduces each party's legal costs and the number of lawsuits filed in court. All parties' interests and rights, however, must be addressed to achieve successful cooperation. [FN134]

Congress took the role of an intermediary when it enacted Section 512 of the DMCA to encourage ISPs and copyright owners to ***806** cooperate. When Congress enacted Section 512, it acknowledged ISPs' and copyright owners' interests on the Internet. ISPs did not want copyright owners suing them for their customer's infringement actions, nor did they want their customers suing them for incorrectly removed material requested by copyright owners. Copyright owners wanted to disable access to illegally posted copyrighted material from ISPs' networks, and they wanted the option to sue copyright infringers. Although both parties had to lobby Congress for this protection, Congress did ensure that Section 512 served each of these party's interests. [FN135]

Congress should encourage online users and the music industry to cooperate by amending Section 512's subpoena process. The court in Verizon III concluded that Section 512(h) did not apply to ISPs acting as a conduit which infers that it will apply to ISPs caching, storing or linking users to the illegal material. The amendment should not be limited to subpoenas issued to ISPs acting solely as a conduit for infringing material. [FN136] Section 512's amendment of the subpoena process should address all categories of ISPs. If online users and the music industry communicate directly about their dispute, it would remove ISPs from being in the middle. It would also build a cooperative relationship between online users and the music industry.

A. Current Cooperative Efforts

Congress created Section 512 to deal with copyright owners' and ISPs' issues. [FN137] Section 512 allows copyright owners to notify ISPs that there is infringing material on their system and the ISP must expeditiously remove the material. [FN138] It also gives copyright owners the subpoena power to demand that the ISP disclose the identity of alleged copyright infringers. [FN139] Section 512 also requires that an ISP be notified of infringing material before they can be held liable for copyright infringement. [FN140] In addition, the ISP is not

held liable by their customers for material incorrectly removed in good faith based upon a copyright owner's request. [FN141] While cooperation requires opponents to be willing, Congress encouraged cooperation by ensuring that copyright***807** owners' and ISPs' interests were addressed in Section 512; as such, both parties have been willing participants.

Section 512 promotes cooperation between ISPs and copyright owners in detecting and dealing "with copyright infringements that take place in the digital networked environment." [FN142] For example, Section 512 has a good faith standard, where copyright owners are not required to show evidence of copyright infringement, only a statement to ISPs of their "good faith" belief that there is copyright infringement, [FN143] and the expeditious removal of that infringing material by the ISP is based upon the ISP's good faith belief in the copyright owner's assertion. [FN144] Once a copyright owner has notified an ISP of infringing material on its website, an ISP is encouraged to remove that material "expeditiously" or else face liability. There is no requirement or encouragement for the ISP to investigate the validity of the notification.

If the ISP has a good faith belief in the alleged copyright owner's request, then the ISP is not liable if the material does not constitute infringement. [FN145] ISPs will be held liable if they do not cooperate, so it appears that they are being forced into cooperation; however, they are receiving benefits because they are not being sued for contributory or vicarious copyright infringement.

In another example, Congress specified that the notification process should be judged on a standard of "substantial" compliance. [FN146] The expectation is that "the parties will comply with the functional requirements of the notification provisions . . . in order to ensure that the notification and take down procedures set forth in this subsection operate smoothly." [FN147] The intent is to ensure that neither ISPs nor ***808** copyright owners are negatively impacted by defective notifications due to technical errors--such as misspelled names--but that copyright owners may still expect to have infringing material removed if "substantial" information is provided by them. [FN148]

Congress implemented these requirements to ensure that ISPs and copyright owners will be willing to cooperate with minimal, if any, judicial intervention. By protecting the interest of the music industry and ISPs, Section 512 has been effective in procuring cooperation without judicial intervention. The current conflict, however, over anonymous online users has developed because users were not included in this cooperative relationship.

B. Expanding Cooperative Efforts

First, online users must be notified of the subpoena for their identity prior to its disclosure. A copyright owner should be required by Section 512 to notify the ISP and the user about the request for the user's identity. The copyright owner can notify the user that it is inquiring about their identity by sending a third-party subpoena to the ISP and having that ISP forward it to the user's real name and address. [FN149] This was also the suggestion of Verizon in the Verizon II case, and the court dismissed the suggestion because it was not specified in Section 512. [FN150] This part of the notification process will not cause any significant

problems because copyright owners are already required to provide a subpoena; the only difference is that they would have to send one to the online user.

Section 512 should require the online user to respond expeditiously to the copyright owner's request. The ISP may want to send a certified letter that requires a signature to the online user in order to show evidence that they sent the subpoena. If the user chooses not to respond expeditiously, then the ISP should disclose the users' name and address, since the user had time to communicate with copyright owners. The phrase “respond expeditiously” should be based on the amount of time it would reasonably take online users to respond after they have received a subpoena from an ISP. The type of response should not be limited to one choice; there should be many options ***809** available for the online user. For example, the user should be able to send a certified letter, make a phone call, access the music industry's website, or have a legal representative make contact. An expeditious response maintains consistency with Section 512 and puts pressure on online users to resolve the problem quickly. [FN151]

Prior notification gives online users the right to refute copyright owner's allegations prior to having their anonymity disclosed. Once anonymity is revealed, it becomes moot for online users to file a motion to prevent the copyright owner from discovering their identity. [FN152] It is important that online users have an opportunity to defend their anonymity and that Section 512 requires that they know about the disclosure request before their identity is revealed.

Second, Section 512 should require more than a good faith belief of infringing material. Currently, copyright owners may request the identity of anonymous online users based on their good faith belief that there is copyright infringement. A good faith belief does not protect online users because it allows copyright owners to claim copyright infringement and demand the identity of alleged copyright infringers without having to show evidence of the infringement.

Copyright owners are able to identify the IP address, the infringing material, and the date and time the material was downloaded or uploaded. A Copyright owner should be required to provide all of this information to the user and the ISP when requesting the identity of the anonymous user. Section 512 allows copyright owners to obtain easily the identities of anonymous users; due to the privacy concern, there should be more than a good faith belief requirement for disclosure.

Thirdly, online users should be able to defend their online anonymity without having to reveal their identity. Online users should be given the opportunity to find a lawyer and have that lawyer represent them in negotiating a settlement agreement with copyright owners. A lawyer could also be used in court proceedings to determine if the alleged copyright infringer's identity should be disclosed. This allows the online user to provide evidence that disclosure would result in harm. It would also ensure that the copyright owner has actual evidence of infringement, instead of just a good faith belief. The opportunity to defend one's anonymity is important to online users, and ***810** copyright owners, like the music industry, should not be able to obtain a user's identity without some safeguards for that user.

Overall, for online users, being notified of a request for their identity will give them the

opportunity to defend their anonymity. Notification, however, is not enough because copyright owners should be required to give more than a good faith belief that there is infringement. A good faith belief may be sufficient in cases where the copyright owner is requesting that the ISP remove infringing material, but that can be remedied easily by having the online user prove to the ISP that the material was incorrectly removed and should be restored. There is no remedy in cases where the user's identity is disclosed because there is no option for the user to repair their anonymity. Section 512 should require evidence of copyright infringement.

Online users should be able to maintain their anonymity while they enter into a settlement agreement with the copyright owner. In cases where there is judicial intervention, online users should be able to retain their anonymity until it has been adjudicated that disclosure is necessary. These requirements address the interests of online users; it gives them incentive to cooperate with copyright owners and ISPs. In the end, amending Section 512 to include these requirements will create a line of communication between the music industry and online users, without ISPs being in the middle.

C. Surviving Technological Advancements

While the ISPs and the music industry have cooperated, the advancement in Internet technology created a new problem. The music industry wants to know the identity of anonymous p2p users, and online users want to protect their right to online anonymity. One of Congress' main goals was to ensure that Section 512's enactment would not subdue Internet technological development and innovation. The idea of establishing a law that would ensure and build a cooperative relationship was important because the relationship can grow as technology advances.

The court in the Verizon III case, correctly reasoned that it is not within the power of the courts to interpret into laws new technology unforeseen by Congress. [FN153] P2p and “spybot” technology were unforeseen by Congress when they enacted Section 512; however, the ***811** idea that technology would advance beyond Napster was predictable. [FN154] The benefit of establishing a cooperative relationship is that it could evolve with technology and without judicial intervention. This relationship could not evolve, however, unless all parties' interests were taken into consideration. The music industry's and ISPs' interests were addressed by Section 512, but online users' interests were not included.

Section 512 of the DMCA preserves incentives and the interests of ISPs and copyright owners. It protected the right of ISPs to continue in their business of offering service to Internet users. Congress' theory was that if ISPs continued to be bombarded by lawsuits for the copyright infringement of their customers, they would lose their economic “incentive to provide quick and efficient access to the Internet,” [FN155] or it would “give the online service providers an excessive incentive to censor” their customers speech or expression on their network systems. [FN156] Congress recognized that if copyright owner's works were consistently pirated online, they would lose their economic incentive to put their creative works online and “the Internet will lack the creative content it needs to reach its true potential.”

[FN157] Section 512 was not intended solely to limit the liability of ISPs but to balance the rights of ISPs and copyright owners by encouraging cooperation between the ISPs and copyright owners, [FN158] thereby fostering innovation on the Internet, which benefits the public. There were no lobbyists, however, focusing on protecting users' rights on the Internet--specifically the right to maintain online anonymity. [FN159]

Congress may not have anticipated the technological advancement from Napster to p2p technology, but Section 512's encouragement of cooperation could have survived it without judicial ***812** intervention. If online users and the music industry were able to communicate in a setting where the music industry was not trampling upon the interests of online users, each party could resolve their issue without judicial intervention. Once online users are notified that copyright owners seek their identity for copyright infringement, and the music industry has procured evidence of this infringement, online users could obtain a lawyer to protect their anonymity and settle the case. In the case where neither party can settle, the online user can bring a motion to quash the subpoena in court. The purpose of cooperation is to allow all parties to discuss and resolve their dispute without judicial intervention. Even if the dispute changes, cooperation can still be the solution so long as each party's interests are adequately protected.

CONCLUSION

In the fall of 2003, the music industry rocked the world when it filed its first set of lawsuits against music fans for illegally sharing music files on the Internet. While copyright owners in the music industry are entitled to sue for illegal music file sharing, [FN160] most people were astonished that they dare seek a legal remedy from their music fans. The music industry's first settlement was with a twelve-year old online user, and they settled for $2,000. [FN161] It is perplexing why the record industry would risk this kind of negative backlash from their fans. The music industry defends its actions by arguing that its goal is to deter digital piracy. But their opponents are not protesting this goal; they are protesting the process implemented to achieve this goal. Opponents' concerns are that the music industry's method of discovering the identity of these accused fans conflicts with these fans' interests in remaining anonymous on the Internet. Privacy on the Internet is an important interest for online users, and anonymity provides the best protection.

Digital piracy will progress because copyright infringers will continue to find new ways to illegally share music files. As a result, the music industry will incur profit loss and continue to subpoena ISPs for the identities of copyright infringers. Not all online users, however, are copyright infringers; so copyright owners should not be free to ***813** obtain the identities of any online user they believe to be an infringer. The outcry by users for protection by judicial intervention will cost all parties too much time and money. Congressional encouragement of cooperation between online users and the music industry could build a relationship that would not cost too much time and money, and survive technological advancements. Also, this relationship would protect all parties' interests, most importantly an online user's interest in defending her anonymity prior to disclosure.

[FNa1]. J.D. Candidate, Howard University School of Law, 2005. I thank my family and friends for their love and encouragement throughout this process. I would also like to thank Professor Steven D. Jamar for reviewing and commenting on earlier drafts, and Joseph T. Gasper II and fellow members of the Howard Law Journal for their editorial assistance.

[FN1]. Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 2 (2004) (opening statement of Sen. Orrin G. Hatch, Chairman, Sen. Comm. on the Judiciary) [hereinafter Music on the Internet], available at http:// frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_ hearings&docid=F:74728.pdf. In his remarks, Senator Hatch explains that digital piracy is a problem and that copyright owners' rights must be protected; but at the same time, we can not obstruct technological advancement or consumers' access to technology. See generally id. at 1-4.

[FN2]. Throughout this Comment, the terms “online user,” “end user,” and “user” all refer to people who connect to the Internet via an Internet Service Provider. “Copyright infringers” or “infringers” are copyright terms that define people who violate the rights of copyright owners by uploading and downloading copyrighted works to the Internet without the copyright owners' consent.

[FN3]. In this Comment “the music industry” refers to recording companies, song writers, recording artists, etc. They are also included as copyright owners because they have the exclusive right to authorize the distribution, sale, or reproduction of musical works on the Internet.

[FN4]. Music on the Internet, supra note 1, at 2. In his speech, Senator Hatch states that the enactment of the Digital Millennium Copyright Act of 1998 (DMCA) “sought to harmonize the copyright laws with the technological changes taking place” on the Internet. Id.

[FN5]. Ariel Berschadsky, RIAA v. NAPSTER: A Window onto the Future of Copyright Law in the Internet Age, 18 J. Marshall J. Computer & Info. L. 755, 758-59 (2004).

> The transmission of music over the Internet began... with the introduction of the World Wide Web and the browser in the early nineties, but was initially hampered by slow transmission speeds. Downloading a five-minute song could easily take several hours given the characteristics of telephone lines, which limited most Internet connections to a speed of 56,000 bauds per second (56K).
>
> Eventually, the MP3 compression algorithm was developed, and it is now the most popular format for downloading music. The widespread use of MP3 files stems from the fact that they are highly compressed yet provide near-CD sound quality. Transmission of MP3 files over the Internet is substantially quicker than it is with older, space-consuming formats such as WAV. Furthermore, as with any digital format, MP3 files can be copied and distributed an unlimited number of times without degrading their sound quality.
>
> Id.

[FN6]. See id. at 759-60.

> [A] Napster user can connect to this [Napster] central database to search for a specific title. Within a few seconds the user is told whether there are any Hosts offering this title.
>
> ... The user specifies from which Host he wishes to download the MP3 file. A message

is then transmitted through Napster's servers to the appropriate Host, which assumes the role of server and immediately begins transferring the file directly to the user through each party's respective ISP. From this point forward, Napster's website is out of the picture.

Id. at 760.

[FN7]. See discussion infra Part I(B).

[FN8]. See discussion infra Part III.

[FN9]. Berschadsky, supra note 5, at 758-59.

[FN10]. Music on the Internet, supra note 1, at 3.

[FN11]. Id.

[FN12]. Id.

[FN13]. Id.

[FN14]. Id.

[FN15]. Id.

[FN16]. Marvin Gaye, What's Going On (Motown Records Corp. 1976).

[FN17]. See generally Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976) (codified as amended at 17 U.S.C. § 101 et seq).

[FN18]. U.S. Const. art. I, § 8, cl. 8.

[FN19]. See generally Goldstein v. California, 412 U.S. 546 (1973).

[FN20]. There are "five fundamental rights that the [Copyright] bill gives to copyright owners--the exclusive rights of reproduction, adaptation, publication, performance, and display--are stated generally in section 106." H. Rep. No. 94-1476.

[FN21]. See 17 U.S.C. § 106 (2004).

[FN22]. See id. § 501.

[FN23]. See id.

[FN24]. See generally Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) (noting that the primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts") (quoting U.S. Const. art I, § 8, cl. 8)).

[FN25]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546, 558 (1985).

[FN26]. See Recording Industry Association of America, 2003 Consumer Profile Chart, available at http:// www.riaa.com/news/marketingdata/pdf/2003consumerprofile.pdf (last visited

Dec. 16, 2004). This is a consumer purchasing chart for 2003. It provides "data on genre, format, age and gender of purchasers and place of purchase." Recording Industry Association of America, Consumer Purchasing Trends, available at http://www.riaa.com/news/marketingdata/purchasing.asp (last visited Dec. 16, 2004).

[FN27]. Digital Millennium Copyright Act of 1998, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976), codified as amended at 17 U.S.C. § 101 et. seq.

[FN28]. Music on the Internet, supra note 1, at 2. In his speech, Senator Hatch states that the enactment of the Digital Millennium Copyright Act of 1998 "sought to harmonize the copyright laws with the technological changes taking place" on the Internet. Id.

[FN29]. See generally 17 U.S.C. § 512 (2004).

[FN30]. Id. § 512(h).

[FN31]. Cf. id. § 512(c)(3).

[FN32]. Cf. id.

[FN33]. See id. (sets forth the notification requirements for copyright owners to give to ISPs). The notification must be written and submitted to the ISP's agent. Id. § 512(c)(3)(A). The notification must include a signature of the copyright owner or their agent, id. § 512(c)(3)(A)(i), identify the alleged infringing material, id. § 512(c)(3)(A)(ii), and identify the location of the alleged infringing material by providing "information reasonably sufficient to permit the service provider to locate the material," id. § 512(c)(3)(A)(iii). The purpose of the notification requirements are to ensure that the ISP has enough information to locate and "expeditiously" attend to the problem. See S. Rep. No. 105-190, at 46 (1998) (Report submitted by Mr. Hatch from the committee on the Judiciary). The notification should also provide "[i]nformation reasonably sufficient to permit the service provider to contact" the complainant. 17 U.S.C. § 512(c)(3)(A)(iv) (2004).

[FN34]. See id. § 512(c).

[FN35]. Id. § 512(c)(3)(A)(v).

[FN36]. Id. § 512(c)(3)(A)(vi).

[FN37]. Subsection (c)(3)(B) addresses notifications that do not "substantially comply with the requirements of subsection (c)(3). See S. Rep. No. 105-190, at 46-47 (1998) (Report submitted by Mr. Hatch from the committee on the Judiciary); see also 17 U.S.C. § 512(c)(3)(B) (2004).

[FN38]. 17 U.S.C. § 512(h)(1) (2004).

[FN39]. See Fed. R. Civ. P. 4 (service of process)

[FN40]. 17 U.S.C. § 512(h) (2004).

[FN41]. Id.

[FN42]. Id. § 512(h)(4).

[FN43]. S. Rep. No. 105-190, at 51 (1998).

[FN44]. 17 U.S.C. § 512(h)(5) (2004).

[FN45]. ISPs have an interest in reducing their legal costs, and complying with notifications to remove infringing material from their networks is advantageous. ISPs also have an interest in complying with the subpoenas, but some ISPs have still refused to disclose identities, thereby incurring legal costs for their customers' right to online anonymity. Fighting for online users' right to online anonymity is not a one-hundred percent altruistic act because these online users are customers and if they are discouraged from communicating over the Internet, the ISPs will have less customers and that translates into profit loss. While ISPs can be praised for their efforts, they have an interest in seeing that their customers are not hesitant to communicate over the Internet.

[FN46]. Music on the Internet, supra note 1, at 2.

[FN47]. Id.

[FN48]. Napster was an online service that allowed users to share music files on the Internet. See generally A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Napster I).

[FN49]. Id. at 1011-12.

[FN50]. Id. at 1011-13.

[FN51]. See id. at 1013-14.

[FN52]. See generally id.

[FN53]. Id. at 1011. Contributory infringement "requires that the secondary infringer 'know or have reason to know' of direct infringement." Id. at 1020 (quoting Cable/Home Comm. Corp. v. Network Prods., Inc., 902 F.2d 829, 845-46 n.29 (11th Cir. 1990)).

[FN54]. Id. at 1011. Vicarious infringement requires that the secondary infringer "'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."' Id. at 1022 (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996)).

[FN55]. See id.

[FN56]. See generally id.

[FN57]. Id. at 1022-23.

[FN58]. Id. at 1017; see also id. at 1013 (finding that overall "as much as eighty-seven per-

cent" of all Napster files may be copyrighted).

[FN59]. Id. at 1017.

[FN60]. The Ninth Circuit affirmed the order to shut down Napster until they came into compliance with the injunction, which is to "polic[e] the[ir] system within the... system." Id. at 1027. It

> enjoined [Napster] from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner.

A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 (N.D. Cal. 2004), injunction aff'd, 284 F.3d 1091, 1095 (9th Cir. 2002) (Napster II).

But, Napster does not have the entire burden, the court

> place[d] the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster I, 239 F.3d at 1027.

[FN61]. P2p allows Internet end-users to search each other's computers for files without an intermediary server. See Angelo Sotira, What Is Gnuttela?, (Dec. 3, 2001), at http://www.gnutella.com/news/4210 (last visited Dec. 16, 2004); How Does Kazaa work? What Is Peer-to-Peer?, at http:// www.sharmannetworks.com/content/view/full/83 (last visited Dec. 16, 2004). Currently, users can only search the files of users with the same p2p client program; each user usually has to select which files or file folders to share with other users--called uploading. Id.

[FN62]. See MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1032 (C.D. Cal. 2003).

[FN63]. See generally id.; Napster II, 284 F.3d at 1097; Napster, 239 F.3d, at 1011.

[FN64]. See generally Napster I, 239 F.3d at 1011; Napster II, 284 F.3d at 1097.

[FN65]. See MGM Studios, Inc., 259 F. Supp. 2d at 1032-33.

[FN66]. See id.

[FN67]. See id.

[FN68]. See id.

[FN69]. See id. at 1031.

[FN70]. See, e.g., Sotira, supra note 55.

[FN71]. See, e.g., MGM Studios, Inc. v. Grokster Ltd., 308 F.3d 1154, 1104 (9th Cir. 2004), cert. granted, 125 S. Ct. 686 (2004).

[FN72]. Displeased by this outcome, copyright owners have petitioned and have been granted a writ of certiorari by the U.S. Supreme Court based upon the question of whether these software owners could be held vicariously liable when they are able to filter illegal music file sharing and when ninety percent of the time their software is used for illegal music file sharing. See MGM Studios, Inc. v. Grokster, Ltd., petition for cert. filed, 2004 WL 2289200 (U.S. Oct. 8, 2004 (No. 04-480)).

[FN73]. See id.

[FN74]. RIAA is a

trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes [its] members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review--state and federal laws, regulations and policies.

Recording Industry Association of America, About Us, available at http://www.riaa.com/about/default.asp (last visited Dec. 16, 2004).

[FN75]. See 17 U.S.C. § 512(h) (2004); Ted Bridis, Recording Industry Sues 261 Song Sharers, Miami Herald, Sept. 9, 2003, at 1A.

[FN76]. John Borland, File-Swapping lawsuits: Are You Next?, CNET News.com, Sept. 8, 2003, available at http://news.com.com/file§wapping+lawsuits+are+you-ext/2100-1027_3-5073004.html. First, RIAA used “spybot” computer programs to automate the search of p2p user's personal computers for copyrighted material that they have uploaded to the Internet. See id; see also In re Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 38 (D.D.C. 2003) (Verizon I), rev'd by Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003). “When [RIAA] finds a person sharing one or more of those files, it downloads all or many of them for verification purposes.” Borland, supra. Second, RIAA uses p2p software's and other software programs' features “to list all the files available within a person's shared folder and takes screenshots of that information.” Id. Third, RIAA records the Internet Protocol (IP) address of the users, which is only traceable back to the ISP. Id. The IP address consists of two parts: the number of the network to which it is connected, and a sequence representing the specific device within that network. See American National Standards Institute, Inc., Telecom Glossary 2004, available at http://www.atis.org/tg2k/_ip_address.html (last visited Dec. 16, 2004). Therefore, the IP address of infringers can be traced back to the infringer's ISP because each ISP is assigned a set of unique network numbers. See id. The ISP can trace the IP address to their customer based on the date and time that the IP address was used for uploading or downloading files. See id. Fourth, RIAA can do further file analysis based on any metadata information or hashes attached to the music files. Borland, supra.

The group checks the artist's name, title, and any “metadata” information attached to the files, looking for information that may indicate what piece of software has been used to

create the file or any other. Some files swapped widely on the Net include messages from the original person who created the MP3 file....

[The RIAA] has databases of digital fingerprints, or "hashes," that identify songs that were swapped online in Napster's heyday. Investigators check these fingerprints against those found in a new suspected file swapper's folder, looking for matches. A match means the file has almost certainly been downloaded from the Net, likely from a stream of copies dating back to the original Napster file.

See id. Fifth, RIAA files a subpoena requesting that the ISP reveal the name and address of the users. See id.; see also 17 U.S.C. § 512(h) (2004). Once RIAA has the name and address of the user they can file a lawsuit or settle the dispute. Borland, supra.

[FN77]. Borland, supra note 76.

[FN78]. See In re Verizon Internet Servs., Inc. 240 F. Supp. 2d 24, 26 (D.D.C. 2003) (Verizon I), rev'd by Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003).

[FN79]. See In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 247 (D.D.C. 2003) (Verizon II), rev'd by Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003); Verizon I, 240 F. Supp. 2d 24, 26 (D.D.C. 2003).

[FN80]. See Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229, 1230 (D.C. Cir. 2003) (Verizon III), cert. denied, 125 S. Ct. 309 (2004).

[FN81]. See Verizon III, 351 F.3d at 1233.

[FN82]. See Verizon II, 257 F. Supp. 2d at 267; Verizon I, 240 F. Supp. 2d at 32.

[FN83]. Verizon I, 240 F. Supp. 2d at 36.

[FN84]. Id. at 37 (quoting S. Rep. No. 105-190, at 1-2).

[FN85]. Id. at 44-45.

[FN86]. Verizon III, 351 F.3d at 1235-36.

[FN87]. Id.

[FN88]. Id. at 1238.

[FN89]. See Verizon I, 240 F. Supp. 2d at 42-43.

[FN90]. See id.

[FN91]. See 17 U.S.C. § 107 (2004).

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an in-

fringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

[FN92]. See id.

[FN93]. See generally McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[FN94]. See generally Watchtower Bible & Tract Society of N.Y. v. Village of Stratton, 536 U.S. 150 (2002) (holding that a law requiring Jehovah Witness' to attain a permit before engaging in “door-to-door advocacy” violates the First Amendment because they have a right to anonymously practice religion and speak freely without interference).

[FN95]. See generally NAACP v. Alabama, 357 U.S. 449 (1958) (holding that compulsory disclosure of member list violated member's First Amendment associational rights and that they have a right to anonymity because past disclosures of member lists has led to threats and economic loss by the disclosed members).

[FN96]. See generally McIntyre, 514 U.S. at 358-59 (1995) (Thomas, J., concurring).

[FN97]. See In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 257-68 (D.D.C. 2003) (Verizon II), rev'd by Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003); In re Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 42-43 (D.D.C. 2003) (Verizon I), rev'd by Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003).

[FN98]. Verizon II, 257 F. Supp. 2d at 260.

[FN99]. Id.

[FN100]. See Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003) (Verizon III), cert. denied, 125 S. Ct. 309 (2004).

[FN101]. See id.

[FN102]. See Verizon I, 240 F. Supp. 2d at 39-40.

[FN103]. Id.

[FN104]. See id. at 41.

[FN105]. Id.

[FN106]. See id. at 40; see also discussion infra Part II(B).

[FN107]. See Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003) (reversing the court below for erring in its interpretation of Section 512), cert. denied, 125 S. Ct. 309 (2004).

[FN108]. Recording Industry Association of America, New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers (Jan. 21, 2004), available at http://www.riaa.com/news/newsletter/012104.asp (last visited Dec. 16, 2004).

[FN109]. B.B. King, Why I Sing the Blues (MCA Records 1969).

[FN110]. Abraham P. Ordover & Andrea Doneff, Alternatives to Litigation 1-4 (2d ed. 2002). The authors explain how the best solution will accommodate the interests of both parties. Id. Also, a WIN-WIN solution will occur if all parties understand the nature of the problem and the individual interests to be protected. Id. at 2-3.

[FN111]. See id. at 13-16.

[FN112]. Id.

[FN113]. See id. at 3.

[FN114]. See 17 U.S.C. § 512(h) (2004); Ted Bridis, Recording Industry Sues 261 Song Sharers, Miami Herald, Sept. 9, 2003, at 1A.

[FN115]. See generally Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) (noting that the primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts") (quoting U.S. Const. art I, § 8, cl. 8)).

[FN116]. For example, in A&M Records, Inc. v. Napster, Inc., the court reasoned that Napster "raised barriers" for the music industry to enter the Internet market. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013, 1017 (9th Cir. 2001) (Napster I).

[FN117]. H. Rep. No. 140-144, at 10620 (1998) (Mr. Goodlatte giving his support for DMCA).

[FN118]. American Heritage College Dictionary 58 (4th ed. 2002) (defining anonymous). A perfect illustration is the cartoon published by the the New Yorker titled "On the Internet, nobody knows you're a dog." Peter Steiner, On the Internet, Nobody Knows You're a Dog, New Yorker, July 5, 1993, at 61 (cartoon illustration).

[FN119]. Beth Givens, Privacy Expectations in a High Tech World, 16 Santa Clara Computer & High Tech. L.J. 347 (2004) (opening presentation at Santa Clara University's symposium on Internet privacy), available at http:// www.privacyrights.org/ar/expect.htm (last visited Dec. 16, 2004). In her presentation, Givens explains that the United States has practiced a standard

or opt-out policy "where the information-gathering entity can further use and disclose the information by default until such time as the individual says 'no.'" Id. at 350. This is in comparison to Europe, which has greater protection for their citizens' private data. Id. at 348. Givens notes that Europe has traditionally practiced an opt-in policy, where "the entity that gathers information from individuals assumes that it cannot disclose it or use it for secondary purposes without first getting permission from those individuals." Id. at 350.

[FN120]. Id. at 351-53.

[FN121]. See Privacy Rights Clearinghouse, Privacy in Cyberspace: Rules of the Road for the Information Superhighway [hereinafter Privacy in Cyberspace], at http://www.privacyrights.org/fs/fs18-cyb.htmPART%20TWO (last visited Dec. 16, 2004).

[FN122]. Givens, supra note 119, at 353-54 (noting that consumers do not realize that the Privacy Act of 1974 only refers to what federal agencies can do with private information and not private entities and that the private industry generally practices the opt-out standards).

[FN123]. See generally Privacy in Cyberspace, supra note 121.

[FN124]. See In re Verizon Internet Servs., Inc. 257 F. Supp. 2d 244, 260 (D.D.C. 2003) (Verizon II), rev'd by, Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003).

[FN125]. 17 U.S.C. § 107 (2004); see also supra text accompanying note 90.

[FN126]. See In re Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 42-43 (D.D.C. 2003) (Verizon I), rev'd by, Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003).

[FN127]. See Verizon I, 240 F. Supp. 2d at 39-40 (stating that Section 512(h) provides greater protection than what is required in a John Doe action).

[FN128]. Fed. R. Civ. P. 45(a)(1)(B).

[FN129]. Id. R. 45(a)(1).

[FN130]. 17 U.S.C. § 512(h)(2)(B) (2004).

[FN131]. Id. § 512(h)(2).

[FN132]. See discussion infra Part III.

[FN133]. Baby Face, When Can I See You (Sony Records 1994).

[FN134]. See Peter K. Yu, Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists, 70 U. Cin. L. Rev. 569 (2002). In his article, Professor Yu discusses how opponents from different counties with conflicting Intellectual Property laws should use a cooperative approach to resolve their problems. See id. Yu explains that a nonzero-sum co-

operative approach is the best method because it will likely result in a win-win solution versus a zero-sum approach that will result in at least one party losing. See id. at 611-16. Yu reasons that for a non-zero sum approach to be successful all parties must have the mindset that the other will not lose, but that they will both win. See id. at 570. With this mindset, each party must recognize each others' perspectives and values. See id. While this Comment does not delve into the concepts of mediation or other alternate dispute resolutions (ADRs), Congress did seem to have these ideologies in mind even though they did not explicitly name them in Section 512. While this Comment does not directly discuss ADR, I nevertheless attempt to explain how Congress' goal of encouraging opponents to cooperate should be expanded to include online users.

[FN135]. See discussion infra Part III(A).

[FN136]. See discussion supra Part I(E)(1).

[FN137]. See discussion supra Part I(B).

[FN138]. See discussion supra Part I(B)(1).

[FN139]. See discussion supra Part I(B)(2).

[FN140]. See discussion supra Part I(B)(1).

[FN141]. See 17 U.S.C. § 512(c) (2004).

[FN142]. S. Rep. No. 105-190, at 40 (1998); see also 17 U.S.C. § 512(c), (h) (2004).

[FN143]. 17 U.S.C. § 512(c)(3)(A)(v) requires the notification to be accompanied by a "statement that the complaining party has a good faith belief that use of the [alleged infringing] material is not authorized by the copyright owner, its agent, or the law."

[FN144]. Subsection (b)(2)(E) requires the service provider to "expeditiously... remove, or disable access to, the material" if they want to be protected under subsection (b). Id. § 512(b)(2)(E). Subsection (c)(1)(C)requires the service provider to "expeditiously... remove, or disable access to, the material" if they want to be protected under subsection (c). Id. § 512(c)(1)(C). Subsection (d)(3) requires the service provider to "expeditiously... remove, or disable access to, the material" if they want to be protected under subsection (d). Id. § 512(d)(3).

[FN145]. Subsection (g) establishes the immunity to service providers who remove alleged infringing material on a good faith effort to comply with the requirements of a copyright owner's notification. Id. § 512(g).

[FN146]. S. Rep. No. 105-190, at 46-47 (1998) (Report submitted by Mr. Hatch from the committee on the Judiciary); see also 17 U.S.C. § 512(c)(3)(B) (2004).

[FN147]. S. Rep. No. 105-190, at 47 (1998) (Report submitted by Mr. Hatch from the Committee on the Judiciary).

[FN148]. Id.

[FN149]. This process still requires ISP involvement because the ISP will still have to go through the process of matching the IP address with the online user, but this is limited involvement with minimal costs.

[FN150]. See discussion supra Part I(E).

[FN151]. See discussion supra Part I(E).

[FN152]. See id.

[FN153]. See discussion supra Part I(E); see also Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.D.C. 2003) (Verizon III).

[FN154]. See discussion supra Part I(E); see also Verizon III, 351 F.3d 1229.

[FN155]. H. Rep. No. 140-144, at 10620 (1998) (Mr. Goodlatte giving his support for DMCA).

[FN156]. Id. (Mr. Frank giving his support for DMCA).

[FN157]. Id. (Mr. Goodlatte giving his support for DMCA).

[FN158]. S. Rep. No. 140-144, at 11890 (1998) (Senator Leahy giving his support for DMCA and noting that § 512 is intended to encourage cooperation between ISPs and copyright owners).

[FN159]. The Congressional Internet Caucus was created to educate the Congress and the public about Internet-related policy issues, such as online privacy. See Congressional Internet Caucus Advisory Committee Members List, at http://www.netcaucus.org/advisory (last visited Feb. 7, 2004) (illustrating a list of organizations at least interested in Internet privacy policy making). Organizations like Electronic Frontier Foundation, Net Nanny, Lawyers Committee for Human Rights, and National Consumer Law Center are interested in protecting online users' privacy interests. See generally id. However, these organizations appear to be reactive, where there appears to be a requirement for lobbyists who will be proactive in protecting users' Internet interests.

[FN160]. See 17 U.S.C. § 107 (2004) (entitling copyright owners to seek legal remedy for copyright infringement acts).

[FN161]. John Borland, RIAA Settles with 12-Year-Old Girl, CNET News.com (Sept. 9, 2003), at http://news.com.com/RIAA§ettles+with+12-year-old+girl/2100-1027_3-5073717.html.
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